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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Parts 1, 21 and 74 to)
Enable Multipoint Distribution)
Service and Instructional)
Television Fixed Service Licensees)
To Engage in Fixed Two-Way)
Transmissions)

MM Docket No. 97-217

File No. RM-9060

REPLY COMMENTS OF BELL SOUTH CORPORATION AND
BELL SOUTH WIRELESS CABLE, INC.

BELL SOUTH CORPORATION

William B. Barfield
Jim O. Llewellyn
BellSouth Corporation
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, GA 30309

Its Attorneys

BELL SOUTH WIRELESS CABLE, INC.

Thompson T. Rawls, II
Gali L. Hagel
BellSouth Wireless Cable, Inc.
1100 Abernathy Road, N.E.
500 Northpark Town Center
Suite 414
Atlanta, GA 30328

February 9, 1998

Its Attorneys

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Summary

The Commission's proposal to enhance MDS and ITFS through the use of two-way audio, video and data communications received near universal support from the commenters in this proceeding, BellSouth included. However, a number of commenters, ITFS licensees and wireless cable operators alike, share BellSouth's concern that it will be impossible for the public to receive viable advanced digital technology services if ITFS licensees and wireless operators are required to divert significant time, energy and resources to comply with new or expanded regulatory requirements. Consistent with its treatment of other services and its overall licensing philosophy, the Commission's focus in this proceeding should be on easing the regulatory hurdles facing ITFS licensees and wireless cable operators.

I. The Conversion To Digital Technology Does Not Warrant Wholesale Changes To The Current ITFS Programming Requirements.

On the eve of the comment deadline, the National ITFS Association, Inc. ("NIA") and Wireless Cable Association International, Inc. ("WCA"), reached agreement on a Joint Statement of Position ("Joint Statement") regarding numerous ITFS issues.

The Joint Statement proposes that each ITFS licensee retain, at a minimum, the right to use 25% of the capacity of its digital channels over time. The first 5% of this capacity would have to be retained by the ITFS licensee and could not be leased. The ITFS licensee's right to recapture the remaining 20% would be subject to certain economic adjustments and other limitations to be agreed by the parties.

In furtherance of the industry compromise on ITFS programming requirements, BellSouth is willing to support an increase in the ITFS airtime reservation to 5% of the capacity of digital

channels. However, BellSouth strongly opposes the proposal in the Joint Statement to set aside for recapture purposes an additional 20% of the capacity made available by digital technology.

As recognized by BellSouth and a number of commenters, including ITFS commenters, increasing the ITFS airtime reservation to a full 25% of available capacity is both arbitrary and unnecessary, since there is no correlation between technological advancements and programming needs, and the current ITFS programming requirements have proven more than sufficient to meet the actual and anticipated programming needs of ITFS licensees. Those commenters also recognize that substantially increasing ITFS programming obligations will retard ITFS licensees and wireless operators from making maximum use of digital technology in the provision of advanced educational and commercial services to the public, and will further skew the odds against ITFS and wireless cable and in favor of other technologies not subject to such restraints. This is a disincentive to utilize digital technology and other technological advancements.

II. Program Shifting, Channel Swapping And Channel Loading Are Essential To The Development Of New Services.

The Commission's proposal to allow program shifting, channel loading and channel swapping received strong support among the commenters, including BellSouth, and is important to advance the interests of ITFS and wireless cable. Program shifting and loading and channel swapping allow for the most efficient use of the spectrum, and afford ITFS licensees and wireless operators much needed flexibility to design their systems so as to best meet their individualized needs while preserving the educational use requirements in the rules.

III. Existing Channel Leases Must Be Grandfathered.

The proposal to grandfather existing ITFS leases received broad support from the

commenters, and constitutes a critical component of the Joint Statement. The commenters generally share BellSouth's view that amending all existing leases would place an impractical and unnecessary burden on licensees and operators alike. It also would unfairly disrupt existing business relationships and operations and deprive the parties of their carefully negotiated benefits of existing lease agreements.

Existing FCC policies provide ITFS licensees with sufficient safeguards in the event of commercial failure of the wireless operator. There is no need to further regulate the default provisions of leases, as several commenters suggest.

IV. The FCC Should Ease If Not Eliminate Current Restrictions On ITFS Lease Terms And Other Matters.

A number of commenters argue that the FCC should allow ITFS leases to extend up to 15 years. The Joint Statement also calls for a 15-year term limit for ITFS leases.

BellSouth does not oppose extending lease terms to 15 years. Under the difficult circumstances faced by ITFS and wireless cable in the digital age, any relief is welcome. But BellSouth firmly believes that, even with the benefit of five additional years, many wireless cable operators simply will not be able to justify the multi-million dollar investment in each market required for conversion to digital technology. BellSouth again urges the Commission to abolish term limits entirely, to allow ITFS licensees and wireless operators the developmental flexibility necessary in the digital world.

The Commission also should eliminate the current policy banning ITFS lease provisions that grant wireless operators some measure of protection in the event the ITFS-lessor decides, prior to the end of the lease, to assign away its license or cease operations. The FCC should not allow ITFS

licensees to avoid their obligations under a lease, any more than it allows wireless operators to do so. Requiring ITFS licensees to cooperate with their operator-lessees to minimize service disruptions is both reasonable and just.

V. The Application Process Must Be Streamlined.

Commenters generally recognize that the current processing scheme has not proven to be an efficient or effective means of processing applications, particularly ITFS applications. BellSouth urges the Commission to adopt Petitioners' proposal of one-day application filing windows with automatic grants, as modified to incorporate expedited interference resolution procedures. This represents a much improved system that should work to the benefit of ITFS and MDS licensees and wireless operators alike. The public would benefit from more efficient administration at the Commission and expedited introduction of advanced educational and commercial services.

VI. Certain Modifications To The Proposed Interference And Technical Rules Are Essential To Protect Existing Service And To Allow For Prompt Initiation Of New Services To The Public

BellSouth supports Wireless One of North Carolina's call for a *de minimis* interference exception to the 45 dB/zero dB standard. Such an exception will promote efficient use of the spectrum by freeing the Commission from rigid application of the interference standards where real-world interference concerns are not implicated.

BellSouth agrees with Petitioners that terrain shielding and the noise floor should be considered in interference analysis. Considering these real-world factors is appropriate, and will simplify interference analysis and limit the number of applications and parties that must consent to a proposal. This should help expedite applications and service to the public.

Petitioners propose that statistical modeling be used to consider the cumulative impact of all

simultaneously-operating facilities. BellSouth believes this is a reasonable approach as long as only one response station per channel per response station area sector is operating at any one time.

In order to reduce potential disruption to existing services, BellSouth believes an antenna mask should be established for the sidelobe and backlobe of an antenna and that no further testing of QPSK and CDMA modulation formats may be needed. BellSouth also believes that the licensee should choose the actual resolution bandwidth. Finally, to the extent response stations are authorized to retransmit, they should be licensed in the same manner as boosters.

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**REPLY COMMENTS OF BELL SOUTH CORPORATION AND
BELL SOUTH WIRELESS CABLE, INC.**

BellSouth Corporation and BellSouth Wireless Cable, Inc. (collectively, "BellSouth"), by their attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submit their Reply Comments to the comments filed by other parties in response to the above-referenced Notice of Proposal Rulemaking (the "NPRM").¹

Introduction

In its Comments in this proceeding, BellSouth demonstrated that the significant technological and service advancements represented by the proposals in the NPRM will never be fully realized if Instructional Television Fixed Service ("ITFS") licensees and wireless cable operators are required to divert significant time, energy and resources to comply with new or expanded regulatory requirements. These sentiments are echoed by educators and wireless cable operators alike in this proceeding. They also are reflected in the industry proposal on ITFS issues. Increasing ITFS programming obligations, subjecting existing ITFS leases to yet another round of regulatory review, and maintaining artificial and entirely antiquated restrictions on ITFS lease terms, all run directly counter to the licensing philosophy advanced today by the FCC. That philosophy, which recognizes

¹ BellSouth previously filed comments in this proceeding on January 8, 1998 ("BellSouth Comments").

that the judgements of individual licensees should shape the nature and components of services offered to the public, has already been implemented for a host of other educational and commercial services, some of which will be in direct competition with wireless cable. The Commission's focus in this proceeding should be on easing the regulatory hurdles facing ITFS licensees and wireless cable operators and maximizing their developmental flexibility so that advanced services can be provided to the public in the most efficient means and without undue delay.

On the eve of the comment deadline, the National ITFS Association, Inc. ("NIA") and Wireless Cable Association International, Inc. ("WCA") reached agreement on a Joint Statement of Position ("Joint Statement") regarding numerous ITFS issues, including ITFS programming requirements in a digital environment. BellSouth commends the NIA and WCA on their diligent efforts to reach an industry-wide consensus on some of the more difficult issues raised in this proceeding. As shown below, BellSouth supports many of the principles embodied in the Joint Statement, but takes exception to the proposal to increase the ITFS airtime reservation to 25% of the capacity made available by digital technology.

Discussion

I. Conversion To Digital Does Not Warrant Wholesale Changes To The Current ITFS Programming Requirements

The Joint Statement proposes that, in the context of digital operations, each ITFS licensee retain, at a minimum, the right to use 25% of the capacity of its channels over time. The first 5% of this capacity would have to be retained by the ITFS licensee and could not be leased. The Joint Statement proposes that the ITFS licensee's right to recapture the remaining 20% may be subject to economic adjustments, so long as such adjustments are not "disproportionate" to the amount of capacity recaptured and do not include "Baseline Consideration" (defined to include the equipment

necessary to operate the station, transmit site lease costs and utility and maintenance costs).² Recapture could be deferred for up to five years, and limited to the rate of 5% per year.³

BellSouth demonstrated in its Comments that the technological advancements represented by the conversion to digital technology do not warrant any corresponding changes to the current ITFS programming requirements.⁴ In fact, the economic and technical challenges faced by ITFS licensees and wireless cable operators compel the Commission to retain the current standard.⁵ Nevertheless, in furtherance of the industry compromise on ITFS programming requirements, BellSouth is willing to support an increase in the ITFS airtime reservation to 5% of the capacity of digital channels.⁶ This reservation alone would represent a potentially substantial increase in the channel capacity available for ITFS use over that currently available through recapture.

² Joint Statement at 1-2.

³ *Id.* at 1.

⁴ BellSouth Comments at 4-7.

⁵ *Id.*

⁶ The current minimum ITFS programming requirements would continue to apply. The current 20 hour minimum/20 hour recapture standard of Section 74.931(e) would apply in the context of analog operations, as urged by a number of commenters. *See* Petitioners Comments at 137; University of Maryland (“UM”) Comments at 6; Catholic Television Network (“CTN”) Comments at 25. In this regard, the Commission should make clear that the current ITFS programming requirements constitute a total of 40 hours per channel per week, including both actual and recapture time. As demonstrated by BellSouth and other commenters, to read the rule as suggested in the NPRM is contrary to precedent and leads to an absurd result, because ITFS licensees could continue to recapture airtime until all of the excess capacity initially made available over their channels was dedicated to ITFS use, presumably with no financial or operational detriment. *See* BellSouth Comments at 9-10. *See also* Petitioners Comments at 137; Wireless One of North Carolina, L.L.C. (“WONC”) Comments at 9; San Francisco-San Jose Educator/Operator Consortium (“Consortium”) Comments at 8-9.

However, BellSouth strongly objects to the proposal to set aside an additional 20% of the capacity made available by digital technology for recapture purposes. Although Petitioners⁷ generally characterized BellSouth's position as "extreme"⁸ relative to their own, this position is grounded both on a practical, common-sense analysis of the implications of forcing the parties to elevate channel capacity over other needs, and on solid Commission precedent and policy. BellSouth is joined by other commenters in recognizing that the existing ITFS programming requirements need not and should not be substantially revised.⁹

As demonstrated by BellSouth in its Comments, ITFS licensees and wireless cable operators have an interdependent relationship.¹⁰ Imposing substantial additional programming requirements on ITFS licensees may require both ITFS licensees and wireless operators to divert time, energy and resources from other, more compelling needs. This would negatively affect not only the revenue stream ITFS licensees can receive over time, but also the range of other substantial benefits available to ITFS licensees.¹¹ In addition, wireless cable operators would not be able to maximize their

⁷ The "Petitioners" include over one hundred participants in the wireless cable industry including the WCA, wireless cable system operators, MDS and ITFS licensees, and others.

⁸ Petitioners Comments at 143.

⁹ See WONC Comments at 9; Consortium Comments at 4.

¹⁰ ITFS channels account for 20 of the 33 channels potentially available to wireless cable system operators for programming and other services. Wireless cable operators such as BellSouth must have access to a sufficient amount of ITFS excess capacity and the cooperation of their ITFS-lessors to develop their systems. By the same token, the growth and development of ITFS since the leasing of excess capacity was first authorized has been attributable in large measure to the financial backing and technical support provided by wireless operators, the continuation of which is directly linked to the degree of competitive success of wireless operators in the commercial marketplace. The Commission itself has long acknowledged this. See BellSouth Comments at 3.

¹¹ Such benefits include, but are by no means limited to (1) increased facilities and staff funding and other grants and underwriting, (2) construction of additional receive sites, booster
(continued...)

competitive potential in the marketplace, actually creating a barrier or disincentive to convert to digital technology.¹² Ultimately, the public will suffer if ITFS licensees and wireless operators are prevented from making the fullest possible use of technology in the development and deployment of advanced educational and commercial services.

The Commission seems to assume that setting aside additional capacity for recapture purposes is the only or best way to ensure that the needs of ITFS licensees will be met. In fact, there are a number of technologies and delivery systems that can be used to provide value added services to ITFS licensees in a manner far more efficient and far less intrusive than further encumbering the limited capacity in the ITFS band¹³. The Commission should allow ITFS licensees maximum flexibility to determine whether technology, additional capacity, or some combination thereof is best suited to meet their needs.

The Commission historically has rejected any nexus between technological advancements and programming needs, recognizing time and again that applying additional regulatory restrictions to the development and utilization of advanced technologies stifles innovation and prevents maximizing the

¹¹(...continued)

stations, repeaters, or other transmission facilities, (3) furnishing of special equipment, (4) assistance in developing and/or securing specific educational programming, and (5) assistance with the utilization and deployment of high speed data and other advanced services. BellSouth Comments at 7.

¹² See BellSouth Comments at 4-5, 8. Educators will be loath to divert already tight resources to increased programming and associated equipment costs and related teacher and staff training, and wireless operators will find it difficult to justify the enormous investment represented by the conversion to digital technology.

¹³ For example, point-to-point microwave, fiber and other wires can be used in the provision of two-way and other advanced services.

benefits that flow from the use of such technologies.¹⁴ The ITFS Parties, a group of 35 ITFS licensees and applicants including some of the most innovative and respected educators and ITFS licensees in the nation, agree that there is no correlation between technological advancements and programming needs:

The fact that a licensee participates in a digital system, making possible far greater capacity, does not change the licensee's need for or capability to provide programming. Many licensees do not have resources to do more.¹⁵

ITFS licensees today are faced with the challenge of harnessing fast-changing technology to further their educational mission. Wireless cable operators are faced with the equally daunting task of competing in a marketplace that, in addition to the hard-wire cable monopoly, is now populated with DBS and other satellite operators, private cable operators and other competitors. New services such as LMDS also loom on the horizon. For the most part, these competitors enjoy the advantage of being subject to far fewer regulatory obstacles than ITFS licensees and wireless cable operators.¹⁶ Imposing substantial new regulatory obligations on ITFS licensees such as a 25% ITFS capacity reservation would only further burden ITFS and wireless cable in comparison to other technologies. The efforts of ITFS licensees and wireless operators to develop viable educational and commercial services would be undermined as a result.

Ironically, a 25% ITFS capacity reservation would have the harshest impact on ITFS licensees and wireless cable operators that provide traditional video services over their digital systems. An

¹⁴ See BellSouth Comments at 4-5, citing *General Electric Co.*, 61 RR 2d 146 (1986); Consortium Comments at 5-6.

¹⁵ ITFS Parties Comments at 13.

¹⁶ For example, the Commission is considering requiring DBS operators to reserve four to seven percent of its channel capacity exclusively for noncommercial, educational or informational programming.

operator providing only Internet and related high speed data services has a competitive need for far less channel capacity than an operator such as BellSouth that provides digital video services. Indeed, for wireless cable operators to compete in today's video marketplace against DBS operators and hard-wire cable systems offering several hundred channels of all-digital service, they must be able to maximize their channel capacity.¹⁷ This need is particularly acute given the huge, upfront cost of integrating the ITFS and other channels into a digital system, costs which are far in excess of those required for conventional analog systems. All this means that a digital video wireless operator must have access to a reasonable amount of the additional capacity made possible by digital technology. Subjecting a full 25% of this capacity to recapture could have the unintended effect of encouraging many operators to abandon their digital video plans and focus exclusively on less capacity intensive uses such as data services, a result certainly not intended by the Commission in this proceeding. This in turn could undermine the plans of many ITFS licensees seeking to provide traditional video services.

Right thinking educators and operators recognize that, today more than ever, maximizing flexibility and service offerings will best promote the underlying purpose of ITFS. The ITFS Parties stress that ITFS licensees "should be free, within certain minimal boundaries relevant to all licensees, to evaluate their current and future capacity needs and negotiate reservation or recapture provisions consistent with those needs."¹⁸ Similarly, the ITFS Commenting Parties urge the Commission to provide the "greatest flexibility" to ITFS licensees and wireless operators, noting that over-regulation

¹⁷ Many of the cable systems with which wireless operators compete have upgraded or soon will upgrade their capacity to 750 MHz, allowing for the transmission of several hundred channels of video and other services. By contrast, wireless cable operators have at most 198 MHz at their disposal, assuming they have acquired rights to all 33 MDS/ITFS analog channels in a market. Subtracted from this is the capacity subject to ITFS use and recapture rights.

¹⁸ ITFS Parties Comments at 14.

of the relationship between the two “will only straight jacket both resulting in less, rather than more, educational and commercial benefit to the public each strives to serve.”¹⁹

The ITFS Commenting Parties correctly point out that:

[M]aintaining arbitrarily determined ratios between the ITFS and commercial usage is bound to have the same stifling effect that the original MDS rules requiring common carrier service and imposing arbitrary market licensing restrictions had upon the wireless cable industry in the early years. Achieving the primary educational purpose of ITFS is the responsibility not of the FCC or the wireless cable industry, but of the educational entities themselves. Each institution knows best its own requirements and the requirements of the local citizenry which it serves. In some ways there appears to be an underlying assumption that the ITFS entities cannot themselves attain and deliver the degree of service to which the public is entitled. This sells the ITFS licensees considerably short.²⁰

ITFS licensees can, and in BellSouth’s experience most often do, secure the rights to additional airtime and other substantiated benefits.²¹ Moreover, because the current ITFS programming requirements afford ITFS licensees and wireless operators necessary flexibility to achieve benefits beyond the educational airtime minimums, ITFS licensees themselves can tailor agreements to their needs.²² As stated by the ITFS Parties, “ITFS licensees should not be required to retain capacity they don’t anticipate needing at the expense of recovering financial, programmatic or facility concessions

¹⁹ ITFS Commenting Parties Comments at 2. The ITFS Commenting Parties note that a large university in a major market is likely to have needs far different from a parochial school in a rural area. Rules designed to apply “across the board” aimed at achieving a general benefit often will have the opposite effect. The maximum benefit to the largest number of participants can only be attained by affording the parties the maximum flexibility possible. *Id.* at 4. *See also* BellSouth Comments at 8-9 (one-size-fits-all rules will actually work to the detriment of a number of licensees and operators).

²⁰ ITFS Commenting Parties Comments at 2-3.

²¹ BellSouth Comments at 7-8.

²² See Footnote 11, *supra*.

that they could obtain if they only retained the capacity they actually need.”²³ The ITFS commenters themselves make a compelling case that the Commission’s focus must be on eliminating regulatory hurdles and maximizing developmental flexibility for ITFS licensees.²⁴

Capacity subject in the future to ITFS recapture is inherently less valuable to wireless cable operators, particularly digital wireless cable operators such as BellSouth that of necessity must place a premium on maximizing channel capacity for their video services. This has a direct negative impact on ITFS lessors. An operator that places programming or other content on capacity that is subject to recapture does so at the risk that this capacity could be lost down the road, potentially resulting in an operational and customer relations nightmare that could have serious financial repercussions. A prudent operator either refrains from making substantial use of capacity subject to recapture, or factors these risks and uncertainties into such use. Either way, capacity encumbered by recapture rights is inherently less valuable to the operator than unencumbered capacity, whether or not the ITFS licensee ever exercises its recapture rights. As such, ITFS licensees necessarily will receive fewer benefits for encumbered capacity. This would constitute a net loss to ITFS attributable solely to government regulation, a loss that could prevent the ITFS licensee from obtaining benefits that it may

²³ ITFS Parties Comments at 9. *See also* Consortium Comments at 6 (ITFS licensees should not be required to meet additional programming requirements at the expense of developing other educational services they may have identified).

²⁴ This flexibility should extend not only to determining the appropriate amount of educational content, but also the type of educational use. BellSouth joins the majority of the commenters in urging the FCC to amend the rules to specify that Internet transmission and related uses of channel capacity may qualify as ITFS programming as long as the use is part of an academic program and is educational, within the ITFS licensee’s reasonable judgment. *See e.g.* Petitioners Comments at 145; ITFS Commenting Parties Comments at 6; CTN Comments at 6; Consortium Comments at 9-12. However, the Commission should not go so far as to allow an ITFS licensee’s provision of commercial services to qualify as ITFS use, as Hispanic Information and Telecommunications Network (“HITN”) suggests. HITN Comments at 10. This is contrary to the essential nature and purpose of the service.

value far more than additional airtime, such as special equipment, programming assistance, and other benefits that promote education directly.²⁵ This situation will only be exacerbated if recapture time is substantially increased.

Since the current 40 hour standard has been more than sufficient to meet the actual and anticipated programming needs of most ITFS licensees,²⁶ and digital deployment will not by itself generate a need for more programming, then there is no logical basis, and thus it would be completely arbitrary, to increase the ITFS airtime reservation to a full 25% of available capacity. The Commission should and must only adopt rules which have a rational basis, and a 25% reservation of digital capacity fails that test.

In furtherance of the industry compromise, BellSouth supports an increase in the ITFS airtime reservation to 5% of channel capacity in a digital environment, but for all of the reasons set forth above, BellSouth strongly opposes the proposed 25% set-aside.

II. Program Shifting , Channel Swapping And Channel Loading Are Essential To The Development Of New Services And The Efficient Use Of Spectrum

The Commission's proposal to allow program shifting, channel loading and channel swapping received strong support among the commenters.²⁷ The ITFS Parties aptly state that they "cannot contemplate going back to a regulatory regime (in either the analog or digital world) that requires the

²⁵ See Footnote 11, *supra*.

²⁶ ITFS Parties Comments at 13; Petitioners Comments at 114.

²⁷ See *e.g.* Joint Statement at 2; BellSouth Comments at 11-12; Petitioners Comments at 147-149; ITFS Parties Comments at 10; WONC Comments at 10; Consortium Comments at 12-16. The concern of the Instructional Telecommunications Foundation ("ITF") that program shifting would entail an unacceptable loss of control by the ITFS licensee is misplaced, given that loading, shifting and swapping will be entirely voluntary, and particular procedures can easily be negotiated between the parties to ensure proper licensee oversight. See ITF Comments at 13; See Consortium Comments at 16.

minimum ITFS programming associated with a channel to be transmitted on that channel.”²⁸

BellSouth is gratified that the majority of the commenters share BellSouth’s view that program shifting and channel loading and swapping allow for the most efficient use of the spectrum and afford ITFS licensees and wireless operators much needed flexibility to design their systems so as to best meet their objectives while preserving the educational requirements in the rules.²⁹

Program shifting, in particular, is critical to maximizing spectrum efficiencies, as wireless cable systems convert from analog to digital transmission. The cost of digital conversion (which includes encoding, compression, encryption, multiplexing and related expenses) can exceed tens of millions of dollars per headend. Such high costs make desirable the deployment of “super” headends that can serve multiple markets or an entire region.³⁰ Absent the option of channel shifting, all local programming from each market, including ITFS programming, would have to be backhauled to a central regional encoding site so that the feeds can be multiplexed with other compressed content for each specific 6 MHz channel. Program shifting will allow ITFS programming to be grouped with all other local content in each market, permitting use of remote encoding, compression, encryption and multiplexing systems in each market. This eliminates the need for a costly backhaul delivery system, reduces the complexity of the network, and improves reliability since a programmed feed requires less processing and transport, and conserves limited spectrum capacity by enabling the frequencies that carry local and ITFS programming to also be used for similar content in the other markets

²⁸ ITFS Parties Comments at 10.

²⁹ BellSouth Comments at 11-12. Program shifting, channel swapping and channel loading also are consistent with the Commission’s view that a licensee’s group of four ITFS channels (or MDS channel groups for that matter) constitutes an “integral constituent of a market wide set of channels.” NPRM at ¶ 71.

³⁰ The entire area served by the “super” headend should be considered an integrated “system” for purposes of channel shifting.

served by the “super” headend. Program shifting thus allows ITFS licensees and wireless operators to achieve efficiencies that would otherwise be beyond reach, and that are absolutely essential given the high costs associated with the conversion to digital transmission.

It also is important that the FCC clarify that program shifting will not constitute a basis for, or be a factor in, a license renewal proceeding.³¹ ITFS licensees should not be jeopardized because shifting has occurred in order to use the technology more efficiently.

BellSouth joins Petitioners in urging the FCC to eliminate the requirement that an ITFS licensee engaged in channel mapping or loading preserve the ability to transmit simultaneously all of its ready recapture time on each of the channels for which it holds a license.³² This unnecessarily requires educators to set aside limited resources for unlikely contingencies, resulting in loss of usefulness and value of the spectrum and opportunity cost to the ITFS licensee.³³ The FCC should defer to educators on scheduling matters.

III. Existing Channel Leases Must Be Grandfathered

The proposal to grandfather existing ITFS leases received broad support from the commenters.³⁴ The Commenters including BellSouth share the general view that amending all existing leases would place an impractical, unnecessary and inequitable burden on licensees and operators alike. In its Comments, BellSouth illustrated how such a requirement would unfairly

³¹ See ITFS Parties Comments at 6, 10; BellSouth Comments at 12.

³² See Petitioners Comments at 149-150. For example, an educator should not have to preserve the right to simultaneous access to all four of its channels on a Saturday morning, for example, when it has a need only for two morning hours.

³³ This problem would only be exacerbated if ITFS recapture time is increased as a result of this proceeding.

³⁴ See e.g. Petitioners Comments at 162-163; ITFS Commenting Parties Comments at 6; WONC Comments at 12; Consortium Comments at 16; Joint Statement at 2.

disrupt existing business relationships and operations and deprive the parties of the carefully negotiated benefits of their existing lease agreements.³⁵ Petitioners correctly note that a number of existing lease agreements provide for a mechanism for the conversion to digital operations. Since the parties have already fixed the appropriate consideration due each as the result of this conversion, it would be improper to require amendments, particularly since in many cases some of the consideration has already been paid.³⁶

The few commenters who favor requiring the amendment of all existing leases offer little, if anything, in the way of meaningful support. The Joint Comments suggest that mandatory amendments are necessary to ensure that the wireless cable lessee and the ITFS licensee have considered the rule changes resulting from this proceeding.³⁷ CTN suggests that amendments should be mandated because the parties to a lease cannot be relied upon to implement the policies adopted in this proceeding.³⁸ To suggest that the parties to lease agreements cannot or will not evaluate the implications of the Commission's actions in this proceeding is absurd and insulting to ITFS licensees and wireless cable operators alike. This view certainly is not shared by the majority of commenters in this proceeding, including NIA or WCA as evidenced by the express language of the Joint Statement. Most commenters on the matter recognize that existing channel leases have been negotiated to maximize the benefits to each party. Because of the unlimited number of variables, the

³⁵ BellSouth Comments at 12-13. The Commission must also recognize that the current business plans of most operators depend in large measure on the terms of existing channel leases. If the FCC mandates the review and amendment of these leases, then these business plans and the multi-million dollar investments that have already been made based on these plans could be called into question, with far-reaching consequences. See BellSouth Comments at 13.

³⁶ Petitioners Comments at 162.

³⁷ Joint Comments at 9.

³⁸ CTN Comments at 29-30.

parties themselves, and not the Commission, are in the best position to determine how preexisting contracts should be revised.

On a related matter, several commenters argue that wireless cable operators should be required by contract to establish an escrow fund or performance bond to ensure that their ITFS-lessors can continue to operate in the event the wireless cable operator becomes insolvent or the lease otherwise terminates.³⁹ The Joint Comments also propose that all leases require that the “transmission system” automatically revert to the ITFS licensee without charge or for nominal consideration upon lease termination.⁴⁰ CTN argues that ITFS licensees should have access even to common system equipment (or its equivalent) at the end of the lease term if necessary to continue operations.⁴¹

Existing FCC policies provide ITFS licensees with sufficient safeguards in the event of commercial failure of the wireless operator. As noted by the Consortium, ITFS excess airtime leases already are required to provide for purchase of the transmission equipment by the ITFS licensee in case of lease termination resulting from the excess capacity lessee’s default, including circumstances in which the lessee declares bankruptcy or makes assignment for the benefit of creditors.⁴² In addition, ITFS licensees are free to, and often do negotiate additional safeguards where the particular circumstances warrant. There is no need to regulate further the default provisions of leases.

³⁹ See Joint Comments at 8; CTN Comments at 29; ITFS Comments at 29.

⁴⁰ Joint Comments at 8.

⁴¹ CTN Comments at 29. This clearly is unworkable given that a number of licensees could then be in a position to lay claim to the same equipment.

⁴² Consortium Comments at 16, citing *Turner Independent School District*, 8 FCC Rcd 3153 (1993).

IV. The FCC Should Ease If Not Eliminate Current Restrictions On ITFS Lease Terms

Many commenters argue that the FCC should allow ITFS leases to extend up to fifteen years.⁴³ As BellSouth observed in its Comments, the FCC has gradually relaxed its ITFS lease term limitations over the years.⁴⁴ Elimination of the current ten-year limit on ITFS leases is now a practical necessity. Conversion to digital technology represents an investment of many millions of dollars in each market by the wireless cable industry. Operators will be unable to justify the enormous expense, and few lenders will be able to finance it, without assurance of long-term access to the additional channel capacity made possible by digital conversion.⁴⁵

BellSouth does not oppose extending ITFS lease terms to 15 years. Under the circumstances, any relief is welcome. However, BellSouth firmly believes that, even with the benefit of five additional years, a number of operators simply will not be able to develop viable business plans because of the limitations on cost recovery and profitability that a 15-year term lease impose. Given this reality, BellSouth again urges the Commission to abolish term limits entirely.

BellSouth agrees with Petitioners that the Commission should eliminate the current policy banning ITFS lease provisions that (1) require the ITFS licensee to assign its remaining obligations under a lease if it chooses to assign its license, and (2) require an ITFS licensee planning to cease operations to give the wireless cable operator a reasonable opportunity to find a suitable substitute entity that will accept assignment of the license and lease.⁴⁶ While these policies may have been

⁴³ See e.g. Petitioners Comments at 156; Joint Statement at Article VII; ITFS Parties Comments at 14; ITFS Commenting Parties Comments at 6; Consortium Comments at 17.

⁴⁴ BellSouth Comments at 14.

⁴⁵ *I.d.* at 14-15.

⁴⁶ Petitioners Comments at 158.

intended to protect the ITFS licensee, they have the effect of denying wireless cable operators reasonable assurance that the leased channels will be available throughout the lease term. The resulting unnecessary business risk has the unintended effect of deterring wireless cable operators from providing ITFS licensees with substantial upfront financial and other consideration. It also makes it more difficult for wireless operators to secure necessary financial support from the investment community. BellSouth cannot see how any ITFS licensee would be harmed by entering into an agreement with the above provisions.⁴⁷ For all of these reasons, the provisions should be permitted by the Commission.

V. The Application Process Must Be Streamlined

There is a general recognition that delays in application processing have been a serious impediment to the growth of ITFS and wireless cable, and that a new, more streamlined and expeditious processing scheme is sorely needed.⁴⁸ This also is an essential component of the NIA/WCA Joint Statement, which calls upon the Commission to “adopt rules providing for the expedited processing and automatic grant of applications to introduce advanced technologies on MDS and ITFS channels ...”⁴⁹

BellSouth wholeheartedly agrees. Indeed, to say that the current processing scheme has not proven to be a particularly efficient or effective means of processing applications would be an

⁴⁷ The current restrictions can have the effect of allowing ITFS licensees to avoid their obligations under a lease.

⁴⁸ See *e.g.* Petitioners Comments at 15-16. The Petitioners suggest that unless the Commission makes radical changes in its application processing procedures, the resulting backlog will sound a “death knell” for wireless cable and its much needed financial and operational support for educators. Petitioners Comments at 18.

⁴⁹ Joint Statement at 3.

understatement.⁵⁰ Petitioners have proposed a new processing scheme based on rolling, one-day filing windows and automatic grants. BellSouth strongly urges adoption and implementation of this scheme by the Commission, with the modifications and refinements discussed below.

Petitioners propose an initial one-week filing window to accommodate what is expected to be a large number of applications at the outset.⁵¹ Thereafter, applications for advanced facilities,⁵² including two-way proposals and major modifications, could be filed at any time pursuant to rolling, one-day filing windows, and processed in accordance with the following guidelines:

- (1) Applications would be required to demonstrate interference protection to all incumbents and comply with detailed technical rules. All potentially affected parties must be served.
- (2) Applications would be placed on public notice as accepted for filing by the staff after a review as to completeness and a determination that all nearby previously proposed and licensed facilities have been analyzed for potential interference or have consented. There would be no verification of the interference analysis itself.
- (3) There is no entitlement to protection from concurrently filed applications. The FCC will not make determinations of mutual exclusivity.
- (4) Potentially affected parties would have 60 days from public notice to formally oppose grant of an application.
- (5) If no objections are filed, the application would be automatically granted as of the 61st day following public notice, unless the FCC concludes on its own before then that there are unresolved issues precluding automatic grant (*e.g.*, international

⁵⁰ Processing delays have been particularly acute with respect to ITFS applications. For example, of the approximately 1000 applications for new or modified ITFS facilities submitted during the October 1995 window, over 60% remain pending. Petitioners Comments at 15-16.

⁵¹ After the initial filing window, there would be a 60 day settlement/amendment period to afford mutually exclusive applicants an opportunity to reach an accommodation. This would be followed by a 60 day petition to deny period. *See* Petitioners Comments at 21-22.

⁵² The scope of the new processing scheme is not entirely clear from Petitioners Comments. BellSouth believes that the new scheme should apply to all MDS and ITFS applications with the exception of applications for new ITFS stations. These would continue to be processed pursuant to periodic filing windows, with mutually exclusive applications subject to the comparative point system.

coordination, environmental problems, FAA problems).

- (6) Adversely affected parties can file a Petition for Reconsideration within 30 days of grant, and the Commission has 40 days to reconsider a grant on its own motion.
- (7) Any facility operated pursuant to an automatically-granted authorization will be required to cure impermissible interference to incumbents.⁵³

There is a perception among some ITFS licensees that they lack the wherewithal to evaluate applications and identify potential problems under this scheme.⁵⁴ The ITFS Parties would support automatic grants only if there is “ironclad” interference protection of licensed receive sites.⁵⁵ Similar sentiments were expressed by other commenters.⁵⁶

BellSouth believes that these concerns can be addressed in a manner similar to that used now by ITFS licensees. Many if not most ITFS licensees currently rely on the wireless cable operator to monitor and evaluate applications that might have an effect on the ITFS licensee’s station.⁵⁷ Presumably, those ITFS licensees that do not rely on a wireless operator presently evaluate interference on their own or with the assistance of legal and engineering consultants. Adoption of the proposed scheme should not have any impact on these evaluation mechanisms.

In addition, multiple layers of protection are built into the proposed processing scheme. First, applicants are required to identify and demonstrate interference protection to incumbents and serve them with a copy of the application in all cases, a requirement not currently in the rules. Second, the

⁵³ Petitioners Comments at 18-29.

⁵⁴ See e.g. ITFS Parties Comments at 7-8; HITN Comments at 4.

⁵⁵ ITFS Parties Comments at 7-8.

⁵⁶ See e.g. Joint Comments at 5; ITFS Commenting Parties Comments at 6;

⁵⁷ The wireless operator has no incentive to shirk its responsibilities, as interference to the ITFS-lessor’s station equates to interference to the operator’s system.